# SOME REMARKS ON CASES OF TREASON IN THE ROMAN COMMONWEALTH

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The state is the community in its corporate aspects and activities. How far these activities, with their consequent limitation and control of individual action, are to extend is for the state itself to determine. Of the individual citizen is required obedience. Disobedience to the mandate of the state, assertion of the individual right as against the right of the community to control, is treason. That appears to be the earliest concept of the offense among the Romans. But while in the Constitution of the United States of America and the modern principles of strict legal interpretation we have the crime of treason definitely circumscribed and limited—limited, I suppose, to an extent unknown before in any constitutional or statutory enactment or precedent—we might rationally expect to find in the early days of Rome a much more elastic definition, or a broad and undefined concept, of treason. (I believe that in early English law there was no definition whatever of treason.) We might expect it to include almost any offense that appeared clearly to affect the state and not altogether or primarily the individual. The murder of a citizen, to cite a single example, might reasonably be expected to be classed along with military insubordination, especially as civil and military functions and jurisdiction were not sharply discriminated. And with equal reason we might expect the crime of treason in its various aspects to be recognized and punished long before any philosophical theory of the basis and nature of the state and its rights was thought of, long before the analysis of concepts and the development of a technical legal vocabulary and the invention of a single term under which might be concluded the different acts that alike appeared to partake of the essential character of treason. And when an inclusive term was finally invented, or grew into use, it would seem probable and even inevitable that it should be a figurative word. It could not be expected to describe with equal precision all aspects of its class of offenses. These conclusions are not arbitrarily concocted

presuppositions, but appear to follow naturally upon the comparative study of custom, law, and language.

Now the earliest word that we know to have been used by the Romans as a descriptive appellation of the crime of treason is the archaic word *perduellio*, which probably meant etymologically "wicked warfare," in contradistinction to the virtuous notion of the Roman that every war directed by Rome against her enemies was *iustum bellum*. The word is archaic, but it is by no means so ancient as must have been the crime, or crimes, it denotes. It is naturally figurative. It seizes upon the most striking element of similarity in the varying aspects of the offenses seen to partake of a common character, and fixes it in a convenient term. *Perduellio* continued to be a technical appellation for the offense, or offenses, of treason throughout the Republic and even during the Empire. But *perduellio* as the denomination for treason did not hold the field alone in popular usage. By an equally natural figure a traitor was called *parricida*, and *parricidium* and *perduellio* play Menaechmic pranks in the literary sources to the quite unnecessary perplexity and confusion of some excellent critics who seem to have forgotten for the moment that all words are in origin figurative.

In the progress of years and the growth toward the study of the philosophy of law and government some trouble appears to have been felt by the Romans themselves with the label *perduellio* for treason. Its etymological limitation, I imagine, was too apparent. Hence toward the end of the Republic there came into vogue a more general term that did not seem to suggest the idea of military delinquency as its essential element of applicability. To commit treason in any form was *maiestatem populi Romani imminuere* or *laedere*, and this better term won its way into general use, and in various abbreviated expressions is familiar to us. *Perduellio* from now on was likely to be applied only in the limited sense suggested by its etymology, but I am quite unable to see sufficient evidence for believing that *maiestas* and *perduellio* divided the field of treason between them in any technical sense of distinction. So also in the later Republican times both *parricida* and even *hostis* were epithets hurled against alleged traitors in oratorical denunciation, but both words are to be viewed as merely figurative missiles and not as technical

definitions. Even when the senate formally by resolution declared certain citizens to be *hostes*, nothing more than a threat of further action is to be inferred. The utterance was of a similar minatory character to the decree that such and such an act would be held to be *contra* or *aduersus rem publicam*, or to the much earlier sanction quoted by Livy (x. 9. 6) in connection with the third Valerian law *de prouocatione* (300 B.C.) that violation of the statute would be *improbe factum* (on which Livy's comment may be taken to be humorous instead of naïve).

But it is manifestly contradictory of all experience to infer from consideration of the etymology or history of the word *perduellio* that in the primitive days treason was confined to military offenses, and the concept broadened down from age to age. The tendency was in the other direction. There is no period traceable when military crimes alone were classed as treason, but it is natural that after *perduellio* came into being as a technical term for treason it should be applied retrospectively in historical narrative to any and all the varying forms of that crime that existed when as yet there was no proper name for them. In the later days of growing analysis and developed vocabulary the concept of treason underwent modification and limitation. Serious military offenses and some not strictly military continued to be classed as treason, but such crimes as murder and sacrilege and extortion or embezzlement were otherwise provided for. (*Sacrilegium*, however, needs discussion elsewhere.)

It will be easy to see the relief the explanation I have suggested affords to certain difficulties found by others in the interpretation of some of the cases of treason during the earlier period of the commonwealth, and notably in the otherwise curious identification or confusion of *perduellio* and *parricidium*. Especially is a classical *crux* of commentators escaped by this refuge. The case of Horatius charged with *perduellio* for the murder of his sister under the reign of King Tullus was regarded as a leading case in Roman law throughout the centuries of the Republic, partly no doubt because of its dramatic character, which alone makes it of interest to most modern readers. The later jurists of the Republic were interested in it because of the procedure followed—indictment, arraignment before the king, delegation of *duumuiri*, and appeal from a death sentence

to the people in *comitia* assembled. The *crux* for some moderns consists in the fact that the fuller legal tradition as given in Livy (i. 23ff.) is definite in asserting that the charge was *perduellio*, which fact is not commented upon by the ancients, who therefore apparently saw no trouble in it. The case of Rabirius (63 B.C.), in which the consul Cicero appeared for the defendant on appeal, was staged after this venerable precedent in charge and form of process. But Rabirius was alleged to have been concerned in the killing of Saturninus, a tribune of the *plebs*. The murder of a state official might be *perduellio*, but how could the homicide of Horatia be brought under this category? Various explanations have been advanced, such as: Horatius was a soldier on service, and unauthorized homicide by him was therefore a military offense; or Horatius, not being a magistrate, had violently usurped the functions of the state itself in executing on his own initiative the alleged traitor who adhered to the enemy; or the tradition errs merely in declaring the actual charge to have been *perduellio*, the error arising from the fact that the penalty for the crime was the same as that for *perduellio* (so Mommsen, but Turnebus had anticipated him in this by some three hundred years). But under the explanation that I have ventured to suggest all trouble with the charge against Horatius disappears. The description of the charge as *perduellio* properly corresponds with the inclusive concept of acts of treason in the primitive period, though it dates in its terminology from that later time when the name for treason had been invented, but at least some flagrant homicides were perhaps still so classified.

The entire history of the Roman Republic is a history of the irreconcilable antinomy between an aristocratic and a democratic theory of government, with a constant swaying of the balance first in one direction, then in the other, and a repeated adjustment that somehow after all kept the machine going through the centuries. That is the essential marvel of the Roman practical "gift for government," as it is perhaps of the British. Now the *perduellis* attacks the existence of the state, like an actively belligerent enemy. It is therefore the right and duty of the magistrate, as the primary guardian of the public welfare, to exercise against him immediately the inherent competence of his office to compel obedience to public

authority, without waiting for the slow process of other formal authorization and procedure. Without doubt the magistrate has this power by virtue of his office, and the practical sense of the Romans repeatedly recognized it. We may compare it in a way to what Sir F. Pollock calls the "private defense or self-help allowed in some conditions of emergency by every system of law, though the aim of modern legislation and government is to reduce it as far as may be." But equally without doubt the community has a right to adjudicate on the *caput* of its members. The administrative authority of the magistrate was in this particular in a perpetual, even when passive, conflict with the judicial authority of the community. If the magistrate could be permitted thus to act as summary constable, judge, and executioner, he had a power over the citizen body that might be subversive of democratic rights. Against his summary jurisdiction was invoked the power of the community as a whole to decide on the exclusion for due cause of one of its members. No act of treason should *ipso facto* render a citizen liable to be treated as an outlaw (cf. Cicero *Pro domo sua* 33, quoted on p. 47). Outlawry should follow only on judicial trial and condemnation. No citizen should be executed without the right of appeal to the people in the *comitia* against the death sentence.

How this principle was established, whether it was primitive or was brought to recognition through a struggle of the growing commonalty against the intrenched aristocracy whose representative the curule magistrate was regarded by the opposition as being, cannot be historically determined. If the latter be the case, it would none the less appear possible that the original community, which had now become a dominant aristocracy through the increment of dependent classes without full civic recognition, had exercised the power in earlier days, and it was no new thing in principle. We find it in active operation, however, only at a later date, when the *ius honorum et suffragii* had been much extended. The commons of that subsequent time claimed the principle to be *uralt*. They pointed far back beyond the Valerian laws, far beyond the Twelve Tables, far beyond the constitution of the Republic, to the early regal period and the paradigmatic case of Horatius, who appealed to the people against the sentence of the king's delegates and was triumphantly

acquitted. But the story is surely treated by most modern writers on Roman public institutions with much greater seriousness and deference than it actually deserves. The attribution of a legal process of the alleged type to so early a date is almost certainly anachronistic. Even the language of the *lex horrendi carminis* (Liv. i. 26. 6) is palpably of no extreme antiquity (compare that of the Twelve Tables), nor is it sufficient to say that, despite Livy's (and perhaps Cicero's, in *Pro Rabirio Perd.*) ignorance of the fact, it may be a later translation of a more archaic original. It would certainly appear that the words *uel intra pomerium uel extra pomerium* pertain to a period after the *prouocatio* had been firmly established, as I think Professor J. S. Reid many years ago pointed out. I believe the whole story of the legal process to be a later etiological invention grafted upon a simple dramatic narrative to enhance the credibility of the very early origin of *prouocatio ad populum.* To Livy the account of the process is patently the story of the origin of *prouocatio* and of its primal institution. Dionysius (iii. 22), though he spins out the tale interminably, knows nothing of *duumuiri* and appeal, but merely says that, by prudent concession from the king, the people then for the first time exercised the right of decision on life or death in the trial of a fellow-citizen. This, though already somewhat sophisticated—for I doubt whether the primitive story went any farther than to represent that the populace was so fired with enthusiasm for the victorious champion that they rose in his defense against the perfectly just sentence of the court, and so brought about the release of the culprit when they could not secure his acquittal—is probably a trace of the earlier form of the narrative, upon which the model adopted by Livy was more elaborately dressed up. About the only really archaic element in Livy's tale is the classification of the homicide as treason.

It is in this matter of dealing with cases of alleged treason that we find through all the life of the Republic the recurring conflict between the two rival powers (as they in practice were) of the aristocracy, which traditionally upheld the full administrative competence of the higher curule magistrates, and the democracy, under the leadership of its tribunes. The right of the people as a whole to the passage or the revision of a death sentence on a citizen was

reiterated in legal enactment from time to time, these repeated affirmations bearing witness to active persistency and frequent evasion on the part of the opposing authority. The last enactment of this sort (if we except the legally questionable action under the direction of Clodius in 59 B.C.) was the *lex Sempronia*, passed under the leadership of Gaius Gracchus in 123 B.C. It is of some incidents connected with, and following upon, this legislation that I now proceed to treat.

In the period just before the time of C. Gracchus the senate had set at naught the rights of the commons by constituting from time to time special tribunals from the death sentences pronounced by which no appeal to the comitial court was recognized. The *lex Sempronia de prouocatione* is nowhere textually reported or so commented upon by the ancients as to make clear its intent and application. But it is a reasonable inference that it was directed against these recent infringements, and that it declared unconstitutional (as we should say) the establishment of such tribunals for the future, reiterating the necessity of bringing directly before the people cases in which a capital sentence was asked for, and holding personally responsible the magistrate who might thereafter act otherwise. To this stroke aimed directly at the prestige of their order the senate delivered a new riposte in the vote that was later and is now commonly called the *senatus consultum ultimum*. To whose ingenuity in legal devices it owed its origin is unknown. But it seems to have had no earlier appearance in history—at least in the scope and meaning that was from this time attributed to it. This saving modification of statement may seem to be necessary because two references are recorded of an earlier date.

Livy (iii. 4. 9) says that in 464 B.C. the senate was so terrified by the military successes of the Aequi *ut, quae forma senatus consulti ultimae semper necessitatis habita est, Postumio, alteri consulum, negotium daretur, uideret ne quid res publica detrimenti caperet.* The explanatory clause (if the perfect tense be rightly taken as "definite") appears to indicate that Livy thought this the first instance of the adoption of the ultimate decree. Of the form as he records it I shall speak later. But that the ultimate decree came into being to meet a purely external emergency, and before the Republic was half a

century old, is barely credible; that it was invented when the dictatorship was available is exceedingly improbable; that Livy by a misapprehension of his later day may have translated into the meaning and formula of the *senatus consultum ultimum* a special decree of the senate under its standing competence giving the consul in residence perhaps extraordinary powers in the raising of emergency forces for the relief of the besieged army and the defense of the city is the simplest and most reasonable explanation.

But a not much later instance recorded also by Livy (vi. 19) does pertain to a civic disturbance. The magistrates were commissioned by vote of the senate in 384 B.C. *ut uideant ne quid ex perniciosis consiliis M. Manli res publica detrimenti capiat.* Here again we have the wording of the decree that was substantially standardized by the later days of the Republic. But it was apparently not so standardized even as early as the time of Gracchus. Cicero (*Phil.* viii. 14) reports the terms of the decree of 121 B.C. as *de ea re ita censuerunt, uti L. Opimius consul rem publicam defenderet.* The technical formula of the introductory clause indicates that the dependent clause also is a *uerbatim* quotation. Yet Cicero was perfectly familiar with the later form of the wording that had been more than once used in his own day, *uideret ne quid detrimenti res publica caperet.* To be sure, he even cites this decree of 121 B.C. in this more technical form in *In Cat.* i. 4, but nowhere in that passage is he professing to quote *uerbatim.* Plutarch (*C. Gracch.* 14) appears to agree with Cicero's other and precise quotation, saying προσέταξαν Ὀπιμίῳ τῷ ὑπάτῳ σώζειν τὴν πόλιν ὅπως δύναιτο καὶ καταλύειν τοὺς τυράννους. It must be conceded that Livy has sophisticated his account, and that some of the objections raised against his first instance apply also against this. Moreover, how did the magistrates act in 384 B.C. under the fateful decree? They brought Manlius to trial in orderly fashion before the people! *Parturiunt montes.* . . . . Evidently here also Livy has translated into the ultimate decree of the senate something that was not of this constitutional character. In short, all evidence that the *senatus consultum ultimum,* properly so denominated, was called into being before 121 B.C. is exceedingly shaky and untrustworthy. Plutarch distinctly says that Opimius was the first to exercise this quasi-dictatorial authority (*C. Gracch.*

18), and it pretty surely had not been invoked against Ti. Gracchus and his followers.

What was accomplished by it in fact on the occasion of its birth is well known. C. Gracchus, or rather his reckless associates, after some fruitless negotiations took refuge in arms, the consul Opimius proceeded against them, and a lamentable slaughter followed. The *lex Sempronia* was flouted, and its author lost his life in the *émeute*.

It would be immensely illuminating to have a report of the debate in the senate that preceded the original formulation of the decree. No whisper of the proceedings has come down to us. Yet the intent of the decree is patent. It was to defy the *lex Sempronia* by a novel statement of authority that might temporarily at least by its form baffle the legal acumen of the opponents and paralyze their action. In our modern term it was a "proclamation of martial law." The decree in effect restored a dictatorship held in commission (cf. Sall. *Cat.* 29). Yet no contemporary appears to have suggested that a practical revival of the dictatorship was in mind (though Plutarch in *C. Gracch.* 18 so compares it). Probably the intimation would have been impolitic at the time in a supporter. The dictatorship had for some reason that can only be conjectured fallen into abeyance. And for another reason the senatorial party would not have chosen to compare their new scheme too precisely to the obsolete dictatorship. The dictator's authority had been in the later period of the office subject to the *prouocatio* (cf. Festus, *s.v. optima lex*), and independence of this in time of emergency was what the aristocracy especially desired to secure for their magistrates. Therefore, as the senate had in the past granted extraordinary authority on occasion to the consuls, and had possessed the unquestioned right to "suspend constitutional guaranties" (to use a modern term) by directing the appointment of a dictator, they claimed, I imagine, to be reviving their ancient prerogative under the new form. It may be that they reverted in theory to a coercive authority of the magistrate which was primitive and thus antedated even the unrestricted power of the dictator and was of right independent of any legislative or judicial control by the people; but this or any other explanation must be regarded as in the nature of mere conjecture.

Whether their action would have been judged constitutional by an appellate tribunal like the Supreme Court of the United States of America appears doubtful. As soon as the shaken commons had recovered a bit from their demoralization, they challenged the constitutionality of the new *senatus consultum* in Roman fashion by arraigning the consul Opimius before the comitial court under the outraged *lex Sempronia*. The senatorial party rallied to his support, the commons had not regained their former strength, and Opimius was acquitted. (I cannot think Ihne's suggestion probable that the senatorial party itself had instigated the prosecution in order to secure the moral effect of an acquittal on its claim.)

On what plea Opimius based his defense cannot be determined. We have no report concerning it, unless, indeed, there is something more than imagination in the plea that Cicero frames in his behalf in *De orat.* ii. 132 ff. and *Part. orat.* 104 ff. Opimius there does not plead official immunity merely because he acted under an authority of the senate which transcended that of a *lex;* he alleges that he acted for the safety of the state, which is a supreme principle (*quaestio est num poena uideatur adficiendus qui ciuem ex senatus consulto patriae conseruandae causa interemerit, cum id per leges non liceret*). The plea in confession and avoidance did not rest on the responsible directive power of the senate (Roman principles, indeed, seldom or never relieved an agent of personal responsibility for an illegal act, to whatever higher direction he was subject), but on the maxim *salus populi suprema lex* (Cic. *De leg.* iii. 8). The case appears thus to be removed into the realm of forensic oratory and party feeling; for how should a *popularis* be forced to admit that the slaying of Fuluius Flaccus rather than of Opimius himself was for the safety of the commonwealth? The plea is the same, it will be noted, that Cicero made for himself on laying down the consulship.

The new, or rather the revived, constitutional principle had been tested by the only method available in Roman procedure and had not been found wanting. Henceforward it might be held to be established. It was put into practice a considerable number of times in the decades that followed, and it even may be regarded as having led to a later revival of the title of dictator. Both *optimates* and *populares*, it is asserted, conceded the constitutionality of the new

procedure. Certainly both parties took refuge in it on occasion; but Cicero's action under it in the year of his consulship still affords some points of interest for discussion.

Cicero had been armed with the ultimate decree before his first speech against Catiline, but his action under it is peculiar and unprecedented. He did, indeed, assert in roundest oratorical terms in his invective (*In Cat.* i, *passim*) that by virtue of the decree he had legal authority to order Catiline off to summary execution. But this thunder may all be for immediate effect. We hear no assertion of this character after that in the first of his four speeches *in Catilinam*. How did he act? With the utmost deference to public opinion. He repeatedly professed and exhibited extreme solicitude that everyone, even the meanest citizen in Rome or the provinces (see *Pro Sulla* 41 ff.), should be convinced of the deadly character of the conspiracy, of the guilt of Catiline and his associates, of the fact that the consul had done nothing from beginning to end *crudeliter aut regie*. He did not venture to arrest and punish Catiline before he broke out in open rebellion. He held repeated meetings of the senate, and conducted its proceedings in appearance as if it were a regular court of criminal jurisdiction. The accused persons were arraigned before it, testimony presented, witnesses examined, defendants interrogated, and finally the jury bidden to consider and return its verdict, which the consul as executive officer of the senatorial court proceeded to carry out. There is not the slightest intimation anywhere (unless possibly in Sall. *Cat.* 50. 3?) that the senate saw anything unusual in the circumstances. But we do. What has become of the traditional swift and independent procedure of a consul under the ultimate decree? One might suppose himself suddenly transported into a formal trial for *maiestas* before the senate of Tiberius.

The more common explanation is that the consul of course had a right to take the advice of the senate as fully and as frequently as he chose; that he was of a wavering and timorous nature in spite of his command of a sonorous vocabulary; that he was uncertain about the extent of complicity in, and sympathy with, the conspiracy; that he feared for his own future safety in case of his taking vigorous action, and craved all possible moral, even if it could not be legal,

support from an aroused senate. That he craved all possible moral support from the senate and from everybody else is evident enough, but, as to the other points, Cicero in fact appears, as he claims to be, alert, confident, bold, thoroughly informed. The unimpeachable evidence that he was able to produce was sufficient to convince even the cats of Rome. Why, then, this unprecedented style of action? What was he dubious about?

I think that he was dubious about the safe constitutional position of the *senatus consultum ultimum*. The *lex Sempronia* had not been repealed or abrogated. It had been overridden in the acquittal of Opimius, but the commons had not surrendered their prerogative. In their recently growing power, against which Cicero had been hoping in vain to cement together senate and *equites*, they were ready to measure swords once more on this point with their opponents. They had tried it in the earlier part of this very year in the case of Rabirius, and he was saved from death only by an antiquated trick, that of the Janiculan flag. In their exasperation over that check they were keenly watching for another opportunity, and were likely to find it in the case of Cicero, who had foiled them in the process against Rabirius. Cicero could hardly hope to evade the impending issue. If he should execute citizens under the shield of the *senatus consultum ultimum*, not only was his own neck in danger, but the authority of the senate was likely to be wrecked in his downfall; if he allowed the culprits to escape death, the very existence of the commonwealth was in danger.

The latter alternative could not be faced for a moment. The only recourse was to inflict the death penalty, and yet to endeavor to escape the imminent final ruin of the constitutionality of the senate's professed prerogative by doing something like what had been done in 121 B.C., by devising a new basis for the old authority. Hence, though Cicero, like a prudent lawyer, formally concedes nothing in derogation of his legal power under the ultimate decree, he avoids the customary forms of action under it, thus veiling it from public view or studiously disguising it. In place thereof he produces in public an entirely novel constitutional principle, and to accompany it as an essential corollary an equally novel mode of judicial procedure.

The new principle was that citizens who committed treason lost *ipso facto* (apparently we must understand from the instant of their crime) their rights as citizens, and might therefore be proceeded against without reference to the *lex Sempronia* and its predecessors of similar tenor, to the protection of which they were no longer entitled. This was asserted by Cicero to Catiline's face in open senate (*In Cat.* i. 28, *an leges quae de ciuium Romanorum supplicio rogatae sunt? at numquam in hac urbe qui a re publica defecerunt ciuium iura tenuerunt*). So also in his argument before the senate on the question of sentence he pointed out with more ingenuity than truth that Julius Caesar and all the senators present who were known to be sympathizers with the commons stood ready to adjudicate then and there on the *caput* of the traitors, and therefore implicitly acknowledged that these malefactors were not citizens, and accordingly were not protected by the *lex Sempronia* (*In Cat.* iv. 10 *at uero C. Caesar intellegit legem Semproniam esse de ciuibus Romanis constitutam; qui autem rei publicae sit hostis, eum ciuem esse nullo modo posse*).

The new mode of procedure was for the senate to go through the forms of a court and pass a death sentence upon the conspirators. In order to determine what Cicero really meant in this regard, it is necessary to examine both the form of his action and his contemporaneous or later utterances concerning it. That the actual proceedings in the senate bore a striking resemblance to those of a court, I have already remarked. From Cicero's own lips we have only forensic statements made in his speeches. I do not think that much can be proved out of a suggestion by Professor F. F. Abbott, in a brief note in the *Classical Journal*, II, 123–25, that Cicero's conception of the senate as a court of criminal jurisdiction "is implied by [his] frequent use in the oration of such words as *iudicare* (e.g., §§ 10, 18) applied to the proposed action of the senate." There are ten examples in the fourth speech *In Catilinam* of the use of some form of *iudicium* or *iudicare;* only three of these (and that of § 10 cited by Mr. Abbott is not one of them) refer to the "proposed action of the senate." Moreover, they may be not technical at all in meaning but merely figurative, as the other seven clearly are. The other words used of the proposed action are all such as are

commonly applied to any senatorial vote. (Mr. Abbott's main point, that the senate is regarded by Cicero as sitting as a court of criminal jurisdiction, is of course not a new one, though Mr. Abbott mentions no predecessors. It had been remarked upon by Mr. A. H. J. Greenidge, in his *Legal Procedure*, etc., p. 403, and the idea goes back, I think, as far as Zumpt, and perhaps farther.)

But a passage from the speech *De domo sua* is so carefully phrased as to be very significant (33, *hoc iuris in hâc ciuitate etiam tum, cum reges essent, dico fuisse, hoc nobis esse a maioribus traditum, hoc esse denique proprium liberae ciuitatis, ut nihil de capite ciuis aut de bonis sine iudicio senatus aut populi aut eorum qui de quaque re constituti iudices sint, detrahi possit*). A *iudicium senatus* is here posited alongside the well-established *iudicium populi* as competent to deal with the *caput* of a citizen. Cicero, I think, must surely have in mind the proceedings against Lentulus and his accomplices.

In the light of this passage certain others, of less sure intent by themselves, acquire added interest. Such are that in *Pro Sulla* 21, where Cicero protests, *quod tandem, Torquate, regnum? consulatus credo, mei; in quo ego imperaui nihil et contra patribus conscriptis et bonis omnibus parui;* and that in *In Pis.* 14, *relatio illa salutaris et diligens fuerat consulis, animaduersio quidem et iudicium senatus;* and that in *Phil.* ii. 18, *comprehensio sontium mea, animaduersio senatus fuit;* and finally *Pro Mil.* 8, where Cicero mentions earlier magistrates who put citizens to death under the authority of the ultimate decree, but in the case of the Catilinarians substitutes the senate in place of the individual (*aut Ahala ille Seruilius aut P. Nasica aut L. Opimius aut C. Marius aut me consule senatus*). All these passages appear to support the belief that Cicero claimed for his *iudicium senatus* a status just as definite and legal as that of the recognized *iudicium populi.*

But how, then, would he attempt to differentiate their jurisdiction? It was very evidently not so co-ordinate, that cases might be brought before either court without discrimination. The difficulty is manifest. I believe that the answer may be found through noting the extreme solicitude of the consul to make widely known among the people as well as clear to the senate the convincing evidence against, and the confession of, the conspirators. In this case there

could be no question of a trial in which the accused might be supposed capable of putting up some kind of defense. Such a case as that might properly be claimed by the *iudicium populi*. But here the consul was dealing with open, notorious, and confessed traitors, just as truly as if they were actually in arms against the state. In such an instance there could be no appeal to the *iudicium populi*. As it was customary for the senate to act by resolution to strengthen the consul's hands in war measures, so it might act under judicial forms in the case of these palpable *hostes*. The *iudicium senatus* was herein but a justifiable extension of the ordinary advisory function of that body. Thus, I think, Cicero may have been able plausibly to defend his new procedure.

The senate, to be sure, had already voted that the conspirators had acted *contra rem publicam* (cf. Sall. *Cat.* 30. 6; 50. 3), but, whatever the moral effect of such a censure, it had no legal force, and the consul does not once refer to it. I do not think that it could have been of any influence in the formulation of the new principle or of the new procedure.

How wide a preliminary campaign of argument Cicero carried on in private among the senators in behalf of his "short way with dissenters" it is impossible to say. Very likely he carried on none at all, but, knowing the Roman mind, was more anxious to establish the precedent of actual accomplishment than to run the risk of argument about constitutional principles. In the absence of a formal judicial determination that the accused persons were not citizens but *hostes*, it would have been awkward to be reminded that there is a clear distinction between the *animus hostilis*, which may be inferred, and the *status hostilis*, which must be legally adjudicated. Of course Cicero claims in behalf of his principle that it had *numquam in hac urbe* been otherwise, but that is mere buncombe for the ears of groundlings. He also asserts that Caesar and his friends concede the validity of the whole thing. Of course Caesar does nothing of the kind. If we may trust Sallust's account of his speech (*Cat.* 51, *passim*), Caesar repeatedly called attention to the unprecedented character of the proceedings and to the fact that they were plainly in the face of the laws. More than that he could hardly venture to do, because it would bring down upon him the wrath of his virulent

foes (cf. Sall. *Cat.* 49; Suet. *Iul.* 17) and thus defeat the object he had in view—to save the lives of the wretched culprits (if it were possible), not because they did not deserve the severest penalty, but because to defeat a death sentence would be to salvage something for his party's position. If Cicero could propose one new principle, Caesar could propose another, that of perpetual imprisonment as a punishment for treason.

What the rest of the senate, or rather, the majority, thought about the matter is not so clear. Very likely the conservatives cared nothing at all about theory, but were convinced that these criminals deserved death, and the consul evidently needed their votes to brace him up to see the thing through.

But it may justly be remarked that Cicero does not always speak as if the senate were a competent court acting in this matter. In the fourth speech *in Catilinam* the tone is, "Express your convictions without fear or favor: I purpose, indeed, to act on your advice and decision, but you are not to have the least compunctions on my account; I am ready and able to shoulder the responsibility." This is not the language of a judge presiding over a court, but of a consul presiding over the senate, in full knowledge that he must be answerable alone for his ultimate action. So also in his speech *pro Sulla* (c. 33), offered a chance to plead the responsibility of the senate, Cicero defiantly takes it all upon himself. This latter incident may be briefly dismissed as a mere bit of oratorical color. As regards the former, it may be said that Cicero could hardly expect to be able to hold, in the face of the novelty of his *iudicium senatus*, that the presiding magistrate was freed from personal responsibility by being legally bound to execute the verdict of the jury, as was the case in an established court. That immunity might be won for the future, if the present case became a recognized precedent, but it was too early yet to expect it.

Cicero had thus attempted to forge a new weapon that I think he hoped would prove an effective implement of defense in the hands of his party against the growing power of the commonalty. But it did not save either himself or his order. Metellus Nepos the tribune silenced him on the ground that he had sent Roman citizens to death without permitting appeal to the people, and the tribune

Clodius later proceeded effectively against him before the *comitia* on the same ground. Evidently his new invention proved but a broken reed. Nothing had been heard of it before his day, nothing was heard of it afterward. It is perhaps significant of his later recognition of its utter futility that in his *De oratore* (55 B.C.) and *Partitio oratoria* (46–45 B.C.) he does not represent it as forming the basis of a defense for Opimius (cf. p. 43).

But Mommsen tried to bring Cicero's stillborn principle of constitutional law to life as after all the underlying principle of all the Roman centuries, just as Cicero had pretended to Catiline that it was. And plenty of other writers on Roman law and constitution have been content to follow Mommsen in this. I think that he nowhere systematically argued the grounds for the theory he adopted, but he could have founded his belief on nothing earlier than these references in Cicero, unless also upon the etymological suggestions of *perduellio* as a general term for treason, which I have sufficiently discussed above. Nowhere from the very beginnings of the Roman state down to 63 B.C. is there the slightest indication in fact or reasonable inference that anyone had already held the theory then propounded, and it is extremely improbable that it could have existed without leaving some traces behind it. Moreover, it is irrational in itself. A citizen does not put himself out of the community by the act of grievously sinning against it. He does not become an actual foreign enemy because he acts like one, nor does the community need to hold such a theory about him before it can proceed to visit condign punishment upon him. If he is actually in arms, it may kill him on the spot. It may on his legal conviction punish him as an enemy. Doubtless his moral culpability dates back to the time of his offense, but in the eye of the law he is a citizen until he is declared otherwise by the verdict of a competent court. The case with the community is precisely the same in essence as with the family. A son commits an offense that brings him under the active operation of the *patria potestas*. The *pater familias* proceeds against him not on the theory that he is not a member of the *familia*, but on the theory that he is. On no other theory does punishment rest: against attack by foreign foes there is swift recourse to extrajudicial defense; no appeal to ordinary court procedure is necessary.

Indeed, the very recognition of *prouocatio* through all the early period is sufficient to prove that no theory coexisted with it that a traitor *ipso facto* lost civic rights from the moment of his crime; for of course a *hostis* never could have had a status before a Roman court, and accordingly *prouocatio* in cases of treason under this theory never could have been recognized.

I have occasionally wondered that someone, if not Mommsen himself, has not espoused the proposition that there were two rival theories held in the Roman commonwealth: one that of the aristocratic party, that a citizen becomes a *hostis* by and from the moment of his act of treason; the other that of the democrats, that a citizen becomes a *hostis* only by and from the moment of legal condemnation for treason. It is needless to say that I do not believe that such a view could be maintained against the overpowering silence of literary and historical tradition, but I am willing to make anyone a present of it.

But it is only fair to mention, even though briefly, two or three passages from the later jurists that appear to have contributed somewhat to Mommsen's adoption of Cicero's theory, because they suggest a retroactive dating of penalties for treason to the moment of the crime. In *Dig.* xlviii. 4. 11 a statement is quoted from Ulpian [†228 A.D.] on the *lex Iulia maiestatis*, in which he says: *is qui in reatu decedit, integri status decedit: exstinguitur enim crimen mortalitate: nisi forte quis maiestatis reus fuit: nam hoc crimine nisi a successoribus purgetur, hereditas fisco uindicatur. plane non quisquis legis Iuliae maiestatis reus est in eadem condicione est, sed qui perduellionis reus est hostili animo aduersus rem publicam uel principem animatus; ceterum si quis ex alia causa legis Iuliae maiestatis reus sit, morte crimine liberatur.* That is, the penalty of confiscation of property on conviction of treason is not avoided by the death of the defendant in the case of the more serious forms of the crime, those that betray the spirit of a foreign foe toward state or prince; for the trial may proceed *post mortem*, and the heirs must secure a verdict of acquittal or forfeit the estate to the *fiscus*. In the category of *aliae causae legis* might be reckoned the crime, for example, of melting up a statue of the emperor that had been duly dedicated (c. 6). The penalty of the more serious offense is indeed apparently

retroactive, and Septimius Seuerus, in the interest of the *fiscus*, made it more definitely so, ruling that in case of conviction the forfeiture applied to all the property held by the criminal at the commission of the offense, subsequent alienation and manumission not being recognized (cf. Modestinus [*ca.* 250 A.D.] in *Dig.* xlviii. 2. 20, *adeo ut diuus Seuerus et Antoninus rescripserint ex quo quis aliquod ex his causis* [sc. *repetundarum et maiestatis*] *crimen contraxit nihil ex bonis suis alienare aut manumittere eum posse*). The penalty of forfeiture is manifestly of such a character that it was possible in the interest of a hungry *fiscus* to make it apply as from the moment of the crime, when the guilt was incurred, while bodily penalties were not susceptible of being made thus retroactive. But there is not the slightest intimation that the forfeiture differs in essence from a fine, or proceeds from a theory, even so late in the Empire, that a traitor or an embezzler or extortioner loses *ipso facto* his civic rights from the moment of his crime.

Nor is there support for Mommsen's theory to be found in the rule about the loss of civic rights by a deserter to the enemy (Callistratus [*temp. Seueri*] in *Dig.* iv. 6. 14, *nam transfugis nullum credendum est beneficium tribui, quibus negatum est postliminium*). Here again a perfectly practical issue is involved. The culprit flees the country, remains over the border, and is formally and by due process of discipline adjudged a deserter. The fugitive by his own voluntary act and choice has put himself beyond the grasp and privilege of the law, which proceeds to determine the existing fact; but in the law itself there is not the least intimation that the penalty does not date entirely from the moment when the fact is legally determined.

I know of no other possible support for Mommsen's theory. It should not have commanded the following that it appears to have had.

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